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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Glenn)

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THE PEOPLE,

Plaintiff and Respondent,

v.

CRYSTAL LYNN ROTHGERY,

Defendant and Appellant.

C087060

(Super. Ct. No. 17NCR12060)

A jury found defendant Crystal Lynn Rothgery guilty of arson. The trial court imposed a sentence of three years' probation and several fines, including a restitution fine and a stayed probation revocation restitution fine.

Defendant appeals contending the trial court prejudicially erred and violated her due process rights by failing to instruct the jury sua sponte to determine if a witness, Jason Hoskey, was an accomplice and to view accomplice testimony with caution. Defendant also argues the restitution fines must be stricken because the court did not pronounce them orally at sentencing. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

On the night of April 28, 2016, Lindsay M. and her boyfriend, Bryan McClain, went to Rolling Hills Casino, where they encountered defendant and Breanna Cross. The next morning, Lindsay and McClain awoke to find Lindsay's car on fire. After Lindsay and McClain put out the fire, someone contacted the Orland Police Department. Officer Michael Branson responded to the call.

During his inspection of the car, Officer Branson found an "incendiary device" made of rope, tissues, and a light bulb near the rear tire on the driver's side. Such a device acts as a time delay -- the arsonist lights a rope on fire, which burns slowly into the gas inside the light bulb and then explodes to light the car on fire.

Lindsay told Officer Branson she believed defendant, Cross, and Hoskey, her ex-boyfriend, each could have been responsible. Lindsay, defendant, and Hoskey previously lived together when Lindsay and Hoskey were dating. After Lindsay and Hoskey broke up, Lindsay moved out and began dating McClain. At the time of the fire, there was an ongoing child custody dispute between Lindsay and Hoskey.

As Officer Branson was placing evidence in his car, defendant and Cross drove by Lindsay's house in defendant's car. Officer Branson pursued the car and once it stopped he talked to defendant and Cross. He received permission to open the trunk and found an open gasoline can inside.

At some point after the fire, Lindsay went to the house shared by defendant and Hoskey and took photographs of items under the carport that looked like those found near her car, including a rope and a light bulb.

Hoskey was called as a witness at trial. His trial testimony varied from earlier statements given at a prior proceeding and to the police. In those prior statements, Hoskey said Cross admitted that it was Cross who dumped the gas and lit the fire and he told Officer Branson defendant "had nothing to do with it." At trial, however, Hoskey testified he spoke to defendant within days of the fire and defendant said she and Cross

set the fire together. Defendant told him they acquired the gas and went to Lindsay's house, but Cross was the one who poured the gasoline on the car and lit it. Hoskey also testified both defendant and Cross were bragging about setting the car on fire. Hoskey acknowledged he is a firefighter and knows how a "drip can" can be used to pour a mixture of diesel and gasoline on an area to start a fire.

A jury found defendant guilty of arson. Prior to sentencing, defendant received the probation report, which recommended the restitution fine and a stayed parole revocation restitution fine, both to be set at \$900. The trial court imposed three years' probation. Defendant's counsel waived the delineation of fines at the beginning of sentencing and confirmed the waiver a second time when the judge asked, "you waived the remaining articulations . . . ?" The minute order reflects this waiver and the abstract of judgment shows a \$300 restitution fine and a stayed \$300 probation revocation restitution fine were imposed.

## DISCUSSION

### I

#### *There Was No Instructional Error*

Defendant argues the trial court erred by failing to give accomplice instructions. She asserts the court had the sua sponte duty to give the accomplice instructions because there was sufficient evidence presented at trial to justify the conclusion that Hoskey was an accomplice to the arson. She further contends this error was prejudicial and violated her due process rights. We disagree.

“ “[W]hen the testimony given upon the trial is sufficient to warrant the conclusion upon the part of the jury that a witness implicating a defendant was an accomplice,” the trial court must instruct the jury, sua sponte, to determine whether the witness was an accomplice. [Citation.] If the testimony establishes that the witness was an accomplice as a matter of law, the jury must be so instructed. [Citation.] In either case, the trial court also must instruct the jury, sua sponte, ‘(1) that the testimony of the

accomplice witness is to be viewed with distrust [citations], and (2) that the defendant cannot be convicted on the basis of the accomplice's testimony unless it is corroborated . . . . ' ' ( *People v. Zapien* (1993) 4 Cal.4th 929, 982.)

Here, the trial court was not required to instruct the jury sua sponte on accomplice testimony because there was no evidence from which a reasonable jury could find Hoskey was an accomplice. To be an accomplice, one must, " 'act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' " ( *People v. Stankewitz* (1990) 51 Cal.3d 72, 90-91.) In arguing Hoskey was an accomplice, defendant cites no evidence to satisfy these elements.

Defendant instead relies on: (1) Hoskey's and Lindsay's custody dispute and rocky relationship at the time of the fire; (2) Lindsay's suspicion of Hoskey's potential involvement; (3) Lindsay's photographs of the rope and light bulb found at Hoskey's and defendant's home depicting items like those used in the incendiary device; (4) the investigating officer's inability to determine whether Hoskey had an alibi; (5) Hoskey's occupation as a "wilderness firefighter"; and (6) Hoskey's understanding of "how to use a drip can containing a mix of gasoline and diesel as a 'torch' to light fires."

While these facts may show a possible motive, opportunity, and access to materials used in the arson, the evidence was plainly insufficient to demonstrate Hoskey had prior knowledge of defendant's intent to commit the crime, shared in defendant's purpose at the time of the crime, or took any action "with the intent or purpose either of committing, or of encouraging or facilitating commission of" the arson. ( *People v. Stankewitz, supra*, 51 Cal.3d at p. 91.) There was further no evidence connecting Hoskey's understanding of "how to use a drip can containing a mix of gasoline and diesel as a 'torch' to light fires" to the incendiary device used in this arson.

In the alternative, defendant argues sufficient evidence existed to find Hoskey aided and abetted defendant and Cross. "Establishing aider and abettor liability 'requires

proof in three distinct areas: (a) the direct perpetrator's actus reus -- a crime committed by the direct perpetrator, (b) the aider and abettor's mens rea -- knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor's actus reus -- conduct by the aider and abettor that in fact assists the achievement of the crime.' ” (*People v. Carrasco* (2014) 59 Cal.4th 924, 968-969.) The aider and abettor argument fails for the same reasons as the accomplice argument -- there was no evidence that Hoskey knew of defendant's unlawful intent or had the intent to assist in the arson, nor was there any evidence Hoskey in fact assisted in the offense.

In the absence of any evidence supporting the conclusion upon the part of the jury that Hoskey was an accomplice, the trial court did not err by not giving accomplice jury instructions.

## II

### *Defendant Waived Oral Imposition Of The Restitution And Probation Revocation Restitution Fines*

Defendant asserts the restitution fine and stayed probation revocation restitution fine must be stricken because such fines must be orally pronounced, and the trial court failed to do so. The People argue that, in waiving the “specific delineation” of fines and fees, defendant forfeited this challenge. We agree with the People -- by affirmatively waiving the oral pronouncement of the fines, defendant waived any objection to their imposition.

“[C]laims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner.” (*People v. Scott* (1994) 9 Cal.4th 331, 354.) “Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing.” (*Id.* at p. 353.) As such, a defendant's objection to the trial court's procedurally flawed manner of sentencing is waived by the failure to make it at the time of sentencing. (See *People v. Tillman* (2000) 22 Cal.4th

300, 303.) The rationale for this rule is “to reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them.” (*Scott*, at p. 353.)

As defendant twice explicitly waived the oral pronouncement of fines and failed to object to their articulation at sentencing, he waived the fines challenge on appeal.

#### DISPOSITION

The judgment is affirmed.

/s/  
Robie, Acting P. J.

We concur:

/s/  
Mauro, J.

/s/  
Duarte, J.